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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-442

JOHN H. POELKER, Mayor of the City of St. Louis, Missouri,
and
R. DEAN WOCHNER, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Petitioners,

vs.

JANE DOE, et al.,
Respondents.

RESPONDENTS' BRIEF

"In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit"

FRANK SUSMAN
SUSMAN, SCHERMER, WILLER & RIMMEL
7733 Forsyth Boulevard—Suite 1100
St. Louis, Missouri 63105
(314) 725-7300
Attorneys for Respondents

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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THE QUESTIONS PRESENTED FOR REVIEW

I. Did the Appellate Court Correctly and Properly Decide the Merits in Reversing the District Court's Decision?

II. Did the Appellate Court Correctly and Properly Award Respondents' Attorneys' Fees on the Basis of "Bad Faith"?

III. Did the Appellate Court Correctly and Properly Decide That Respondent Doe Had Standing and Has the Issue of Standing Been Untimely Herein Raised?

STATEMENT OF THE CASE

A. Chronology of Pleadings.

On August 17, 1973 respondents filed in said cause No. 73C565(A) their "Complaint for Declaratory Judgment and Injunctive Relief", seeking to obtain the free and ready availability of abortions within the confines of the St. Louis City public hospitals for women eligible for treatment there.

On March 22, 1974 the District Court entered its "Memorandum and Order" dismissing said cause for lack of respondents' standing necessary to pursue the same, as a result of respondent Doe then no longer being pregnant. "Notice of Appeal" to the Eighth Circuit was duly filed by respondents on March 26, 1974 and the matter briefed and orally argued by both parties. On June 4, 1974 respondents were held to have standing and this cause was "reverse(d) and remand(ed) to the district court for further proceedings consistent with the views expressed in this opinion and in our opinion in Nyberg v. City of Virginia, 495 F.2d 1342 (8th Cir. 1974)." *Doe* v. *Poelker*, etc., et al., 497 F.2d 1063, 1967 (8th Cir. 1974). Rehearing *en banc* was denied on June 27, 1974 and a request for stay was denied by this Honorable Court on July 18, 1974 (Cause No. A-1320).

On remand, a trial was held on November 25, 1974 and on January 13, 1975 the District Court entered its "Order" and "Memorandum and Order" dismissing said cause with prejudice. "Notice of Appeal" to the Eighth Circuit again was duly filed by respondents on January 20, 1975. On April 14, 1975 this cause was reversed upon the merits. The policy of petitioners as to a blanket prohibition against abortions and the staffing policies of the city hospitals were all declared unconstitutional. *Doe*, et al. v. *Poelker*, etc., et al., 515 F.2d 541 (8th Cir. 1975).

Rehearing *en banc* was denied on May 7, 1975 and again denied on June 14, 1975. A request for stay was denied by the Honorable Harry A. Blackman on August 5, 1975 and a similar request for stay was denied by the Honorable Lewis F. Powell, Jr. on August 26, 1975.

Petitioners' writ of certiorari was docketed on September 20, 1975.

B. Chronology of Facts.

Respondent Doe on August 7, 1973 was a resident of St. Louis, Missouri, twenty-six years of age and, although married, had been separated from her husband since February 1, 1974. (R. 62). She had two children at that time, a daughter seven years of age and a son nine years of age. (R. 62). She had no medical insurance coverage (R. 62-63) and held a city hospital clinic card. (R. 65).

Prior to August 7, 1973, her husband had been arrested and charged with a crime. (R. 63). Additionally, she had experienced five prior miscarriages. (R. 63; Pls. Ex. 2).

Jane Doe suspected she was again pregnant in late July of 1973 because of a missed menses. (R. 64). She first visited the gynecological clinic of City Hospital on August 7, 1973. (R. 65). Although she could not recall the name of the "physician" (R. 66), she specifically requested an abortion at the city hospital. (R. 65-66). She was informed that an abortion was not possible because it was contrary to hospital policy. (R. 67). The "physician" referred her instead to the obstetrical clinic at city hospital and an appointment for August 13, 1973 was made. (R. 67).

The "physician" on this first visit of August 17, 1973, was Stephen Pandol, then a third year medical student at St. Louis University. (R. 83). His testimony does not contradict that of Jane Doe. (See, Pls. Ex. 2).

Jane Doe appeared at the appointment made for August 13, 1973, at the obstetrical clinic of City Hospital (R. 67) and spoke with Mr. Gregory Totel, a then third year medical student at St. Louis University. (R. 90). Mr. Totel stated to Jane Doe the positive results of her pregnancy tests (R. 93-94) and she requested an abortion at City Hospital. (R. 94). He found no medical indications for an abortion (R. 91) and such reasons, if existent, would have been "severe diabetes, a patient with a severe heart condition, something of that type." (R. 95). Mr. Totel indicated he had "personal convictions against the performance of abortions." (R. 95). He knew of no one at City Hospital to whom to refer Jane Doe,

> "(s)imply because all the people on our service for one reason or another did not engage in abortions . . . [for either] (p)ersonal or religious [reasons]." (Bracketed material supplied). (R. 97). (See, also, Pls. Ex. 2).

On August 14, 1973, she returned and spoke on that occasion with Dr. William J. Ott, from whom she again requested an abortion. (R. 68). Dr. Ott was then serving as chief resident from St. Louis University to the obstetrical service at City Hospital. (R. 99-100). Dr. Ott, because of his personal beliefs against abortion, even refused to provide her with a written statement as to her state of pregnancy. (R. 102). Jane Doe stated to him her desire for an abortion. (R. 104). Dr. Ott further stated that he had received similar requests from patients desiring abortions at City Hospital and his response to such patients had always been the same. (R. 105-106). Dr. Ott referred respondent Doe to Dr. Ziad Abu Dalu. (R. 102). Dr. Ott's medical opinion was that Jane Doe evidenced "no medical indications for termination of pregnancy" (R. 104); but as he stated, "as the professional theories and education applied to me there are no indications for termination of pregnancy." (R. 109). Lastly, Dr. Ott testified that all medical students at City Hospital are students at St. Louis University. (R. 107).

The last physician seen by Jane Doe was Dr. Ziad Abu Dalu, who was the physician to whom Dr. Ott referred her. (R. 69). She told Dr. Abu Dalu she desired an abortion at City Hospital and he responded it could not be done there. (R. 69, 112, 113). Dr. Abu Dalu saw Jane Doe again on August 15, 1973 and basically the conversation of the prior day was repeated. (R. 71, 72).

Dr. Abu Dalu found no "medical reasons" to justify an abortion for this patient (R. 113) and such reasons would be "(s)evere sickness of the paitent, severe debilitating diseases that might affect the mother's health or jeopardize her life." (R. 120). He further did not refer her to another physician for the abortion "(b)ecause I wouldn't discuss it with any other physician. It's a matter of belief and a privacy between a doctor and a patient and I wouldn't push it to any other physician. It's unethical." (R. 120-121). Dr. Abu Dalu admitted he would refer any other "medical or surgical procedures" which he was "unable or unwilling to perform" to another physician. (R. 122-123).

Jane Doe was aborted on August 22, 1973 at the facilities of Reproductive Health Services, a private medical clinic. (R. 74; Pls. Ex. 4).

There was vague and illusive testimony during trial about an obstetrical-gynecological service at City Hospital operated by Washington University, although contrary to petitioner Wochner's statement that the service is staffed exclusively by St. Louis University. (R. 33). Dr. Frank Ostapowicz, Section Head of the Obstetrics and Gynecological Service at St. Louis University, referred to the same as existing "maybe in name only." (R. 41). Mr. Totel referred to the "theoretical existence" of another staffed service (R. 97), but knew of no physicians associated with the Washington University service. (R. 98). Finally, in the nine months of service spent by Dr. Abu Dalu practicing in the obstetrical-gynecological department of City Hospital, he

saw only physicians "known to (him) to be associated with St. Louis University." (Parenthetical material supplied). (R. 124).

Respondent Doe's medical record indicates confirmed cervical fibroid tumors, polyps, vaginitis, erythema, trichomycosis and an extremely retroverted uterus. (Pls. Ex. 2).

Reverend Robert Brungs, S.J., a Jesuit priest and teacher at St. Louis University identified "plaintiffs' exhibit no. 3" as the existing "Faculty Manual of St. Louis University" (Revised September 1968). The exhibit provides on page 34 as follows,

> "(3) Causes of Termination of Tenured Appointment or of Non-Tenured Contracts During the Contract Period
>
> The University may institute procedures for the termination of tenured appointments or current contracts on the basis of the following causes:
>
> . . .
>
> (e) A grave offense in the discharge of University responsibilities, which is clearly against well-established principles of Catholic morality.[14]

---

[14] It should be noted that the offense must be committed during the discharge of University responsibilities. There is no reference here to the private and personal life of the faculty member. Examples of a grave offense committed in the discharge of University responsibilities would be the encouragement of sexual license in a student organization by its faculty moderator or the performance before students by a member of the Medical Faculty of an operation that, by Catholic standards, is clearly and gravely immoral."

Reverend Brungs testified that "By Catholic standards . . . the performance of an abortion before students by a member of the medical faculty (is) a clearly and gravely immoral act". (R. 58, 59). Dr. Ostapowicz similarly testified (R. 52) and indicated its application to the medical school faculty. (R. 50. "St. Louis

University is a Jesuit institution" (R. 54) and as the District Court noted, "(i)t's certainly admitted St. Louis University is a Catholic institution". (R. 14).

INTRODUCTION

Petitioners' Writ for Certiorari (Pet.) is a last ditch, frenetic effort by them to deny to the indigent women in the City of St. Louis, Missouri, free and ready access to the facilities, personnel and services of the public hospitals for the purposes of abortion.

Petitioners have chosen to ignore the unanimous line of identical public hospital cases previously decided and in so choosing, confess their inability to distinguish the same from the situation at bar.

Petitioners have consistently chosen to attack respondents' counsel in splenetic fashion throughout the course of these proceedings. Within their "Petition" they unwarrantedly and falsely accuse respondents' counsel of intentionally withholding evidence (Pet. 10, 32, 40), of procuring respondent Doe's abortion at their expense (Pet. 12), of trying the case in the news media (Pet. 12), and of filing a false affidavit (Pet. 13, 32, 40). Petitioners further attribute to respondents' counsel motivations which have no basis in fact or reality. (Pet. 15, 31, 32). All of petitioners' emotional and hysterical polemics cannot alter the fundamental constitutional rights of respondents which the Appellate Court has resolutely protected.

ARGUMENT

I

The Appellate Court Correctly and Properly Reversed the District Court's Decision and Awarded Judgment to the Respondents on the Merits.

This is not, as petitioners would have this Honorable Court believe, a question of abortion on demand. (Pet. 23). Not a single abortion has been performed in the St. Louis public hospitals between January 1, 1973 and October 16, 1975. The factors creating this abhorent condition were the expressed policy of petitioner Poelker and the staffing policies of the City Hospitals. Both of these issues were clearly presented, briefed, argued and decided in this cause.

A. **The factual pattern of the exclusion of abortions, as medical procedures performed within the confines of the public hospitals of the City of St. Louis, Missouri, was clearly within the scope of respondents' pleadings.**

Paragraph 3 of respondents' "Complaint for Declaratory Judgment and Injunctive Relief", filed August 17, 1973, succinctly although encompassingly, declared,

> "3. This is an action for a declaratory judgment and permanent injunction against the existence, application, implementation and enforcement of express and implied policies, rules, regulations, procedures and practices barring, thwarting, limiting and infringing upon the utilization of the personnel, facilities and services of the general, public hospitals of the City of St. Louis, Missouri, namely, Starkloff Memorial Hospital located at 1515 Lafayette within the City of St. Louis, Missouri and Homer G. Phillips Hospital located at 2601 Whittier within the City of St. Louis, Missouri, for the performance of abortions."

In no manner did respondents at any time indicate or imply that the entire thrust of their action was to void the unwritten oral statements of petitioner Poelker, directing that abortions not be performed within the public hospital facilities of St. Louis, Missouri unless medical indications necessary to preserve the life of the patient were indicated.

In fact, the evidence at trial was directed in main to the staffing policies at Starkloff Memorial Hospital, as well as to petitioner Poelker's personal fiat. The issue was the non-performance of abortions, not petitioner Poelker's religious views.

It is clear that the District Court in its "Memorandum and Order" managed to sidestep entirely the policy of petitioner Poelker, thereby avoiding any confrontation with and ruling upon said policy. The District Court accomplished this evasion by indirectly finding, although not directly stating, that the policy never applied to respondent Doe but finding, rather, that she was refused an abortion by each and every examining physician or medical student for alternative reasons. 515 F.2d at p. 542. Thus, while relying exclusively upon these alternative reasons for the denial of the abortion to justify its decision, the District Court simultaneously refused to recognize or to accept these declinations made to respondent Doe as a basis of her claims.

The District Court stated repeatedly,

> "THE COURT: We're not dealing with that. You're dealing with a policy. If you think under the pleading in the lawsuit I have that we're going to get into the staffing of those hospitals, you're just wrong. We're dealing here with the policy, and if you think that this Court under the pleadings that you have got here—if you want those things, if

that's what you're trying to accomplish, and that's what I assumed that you were trying to do, you've got another lawsuit. Now, there's testimony in addition to that by one of the people you've got here that one of the sections down there is staffed by Washington University people. Now, you indicated in my office sometime that you wanted to do this. I can tell you in my judgment this lawsuit does not attack the staffing of those hospitals, does not require them to staff them in a particular way. This pertains only to a policy that's laid down by the Mayor of the City." (R. 58).

"THE COURT: There's no need to argue that. We've been down that before. I so indicated in the office that I don't understand them (the pleadings) to be so broad. I didn't understand that's what you even were asking for originally and I, in my judgment, if that's what you're after, that's a different ball game. . . . You're going to have to do that in another lawsuit, in my opinion." (Parenthetical material supplied). (R. 60-61).

Respondents from the beginning, since August 17, 1973, sought to challenge the systematic exclusion of all abortions, the rights to which were guaranteed by *Roe*, et al. v. *Wade*, etc., 410 U.S. 113 (1973) and *Doe*, et al. v. *Bolton*, etc., et al., 410 U.S. 179 (1973); regardless of the specific nature assumed by the various guises of restrictive encumbrances generated by petitioners. A reading of Rule of Civil Procedure No. 8(f) that, "(a)ll pleadings shall be so construed as to do substantial justice" further supports respondents' contention. Petitioners had adequate notice from the pleadings and throughout the course of this cause as to the ultimate relief sought by respondents. Petitioners on no occasion claimed surprise during trial. To have required additional litigation to achieve the result, which is constitutionally demanded herein, would have produced substantial justice for neither party.

As the Appellate Court noted,

"From exchanges which occurred during the trial it appears that the district judge thought the complaint was not broad enough to cover an attack on the staffing of the OB-GYN clinic. We disagree. The complaint specifically mentions 'procedures and practices' which thwart the performance of abortions as being under attack. The manner of staffing a hospital is certainly a 'procedure and practice' of that hospital. And, of course, any complaint must be read in the light of Fed.F.Civ.P. 8(f), which states that '(a)ll pleadings shall be so constructed as to do substantial justice.'"

"The city can hardly complain that it was surprised by the staffing issue in view of the broad wording of the complaint. It certainly knew that the gravamen was an attack on everything the city did which had the effect of keeping abortions from being performed in its hospitals. And when Doe put on evidence relating to staffing, the city did not ask for a continuance or attempt to offer any contrary evidence of its own." 515 F.2d at p. 543 at fn. 4.

B. **The merits.**

Briefly, the merits may be stated as follows. On January 22, 1973 this Honorable Court rendered its historic decisions recognizing the constitutional right of women to terminate pregnancy in consultation with their physician. *Roe, supra* and *Doe, supra*. It is difficult to recall another decision of modern times which has had such a profound and intimate effect upon the lives of so many citizens of our country. Ironically, it was this very right which was invidiously being denied to women, particularly to indigent women, of the City of St. Louis, Missouri.

Although accused of "judicial legislation" by many, this Honorable Court in *Roe, supra*, was explicit and exacting as to what states may and may not do to regulate the area of abortion. This Honorable Court very early in its decision stated,

"The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. . . . the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late state of pregnancy." 410 U.S. at p. 150.

This Honorable Court continued,

"As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved." 410 U.S. at p. 159.

"With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now established medical fact, referred to above at p. 149, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." . . .

"This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State." 410 U.S. at p. 163.

Later, this Honorable Court repeated itself so as to make its dictates crystal clear,

"To summarize and to repeat:

. . .

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 410 U.S. at pp. 164-165.

Petitioners through the admitted, prohibitive policies and practices in regard to abortions, within the publicly, maintained and publicly, financed hospitals of the City of St. Louis, had impermissibly intruded into the decision-making privacy of the indigent woman. This Honorable Court unequivocably denied to the state or those acting in its behalf the right to dictate medical policy and procedure in the constitutionally protected area of abortion, a right the petitioners had blatantly usurped.

Petitioners through their arbitrarily, imposed and continued policies and practices had attempted to dictate to respondent and her class, personal decisions in regard to procreation and sexual mores, retained and guaranteed to them by constitutional mandates. See: *Griswold*, et al. v. *Connecticut*, 381 U.S. 479 (1965); *Eisenstadt*, etc. v. *Baird*, 405 U.S. 438 (1972); *Roe*, *supra;* and *Doe*, *supra*. This flagrant imposition of the moral

values of some upon all was constitutionally impermissible and its continued force and effect was intolerable.

As so aptly noted in *Hathaway* v. *Worcester City Hospital*, et al., 475 F.2d 701 (1st Cir. 1973), *stay denied*, 411 U.S. 929 (1973), the Court of Appeals, in voiding a city hospital policy of forbidding its facilities to be used for sterilization procedures, held,

> "The state interests, recognized by *Roe* as legitimate, are far less compelling in this context. Whatever interest the state might assert in preserving the possibility of future fetuses cannot rival its interest in preserving an actual fetus, which was found sufficiently compelling to outweigh the woman's interest only at the point of viability. The state maintains of course a significant interest in protecting the health and life of the mother who, as here, cares for others whom the state might otherwise be compelled to provide for. Yet whatever health regulations might be appropriate to vindicate that interest, and on the present record we need not decide the issue, it is clear under *Roe* and *Doe* that a complete ban on a surgical procedure relating to the fundamental interest in the pregnancy decision is far too broad when other comparable surgical procedures are performed."
>
> . . .
>
> "*Doe* therefore requires that we hold the hospital's unique ban on sterilization operations violative of the Equal Protection Clause of the Fourteenth Amendment."
>
> "In so holding, we are not mandating the city or state to maintain this hospital, or to retain its present size, staff or facilities. The hospital is not required to perform all kinds of non-therapeutic or even all therapeutic surgical procedures. We are merely saying, consistent with the Supreme Court's reasoning in *Shapiro* with regard to welfare payments that once the state has undertaken to provide general short-term hospital care, as here, it may not constitutionally draw the line at medically indistinguishable surgical procedures that impinge on fundamental rights." 475 F.2d at p. 706. See, also, *McCabe* v. *Nassau County Medical Center*, et al., 453 F.2d 698 (2nd Cir. 1971).

Similarly, is *Doe*, et al. v. *General Hospital of the District of Columbia*, et al., 313 F.Supp. 1170 (D.D.C. 1970), *affirmed*, 434 F.2d 423 (D.C.C. 1970) and *affirmed*, 434 F.2d 427 (D. C.C. 1970), in which the Appellate Court held that public hospitals could not constitutionally deny abortions to women seeking them. In *Nyberg*, et al. v. *The City of Virginia*, et al., 495 F.2d 1342 (8th Cir. 1974), *cert. denied*, 419 U.S. 891 (1974), the Eighth Circuit noted,

> "The resolution prohibits the use of hospital facilities for the performing of any abortion which is not necessary to preserve the life of the mother. Because we find that the resolution unduly restricts what the United States Supreme Court has held to be a fundamental right, we are compelled to hold the resolution unconstitutional." 495 F.2d at p. 1343.
>
> . . .
>
> "The language of Roe v. Wade and Doe v. Bolton expressed the plain view that the abortion decision and its implementation is a fundamental right of personal liberty embraced with the Due Process Clause of the Fourteenth Amendment and is thereby protected from undue infringement by the State. In other words, absent compelling circumstances of state interest, regulation of 'certain fundamental rights,' including abortion is unconstitutional." 495 F.2d at pp. 1344-1345.
>
> . . .

"The trial court here, as did the First Circuit in *Hathaway*, felt required to hold that an outright ban on nontherapeutic abortions (Hathaway dealt with a municipal hospital's ban on sterilization operations) was unconstitutional under the teachings of *Doe* and *Roe*. We agree."

"The record in this case demonstrates no compelling circumstances which would mandate this hospital's abortion restricting rules. Nothing on this record indicates that the performance of abortions will interfere with the normal hospital routine or require further staff and facilities. The ban on all abortions other than those to save the mother's life serves neither the hospital nor the state. Doe v. Bolton, *supra* at 198 . . ."

. . .

"The sweeping hospital resolution in question here cannot withstand the constitutional parameters framed by Doe and Roe. It would be a nonsequitur to say that the abortion decision and its effectuation is an election to be made by the physician and his patient without interference by the state and then allow the state, through its public hospitals, to effectively bar the physician from using state facilities to perform the operation." 495 F.2d at p. 1346.

The validity of a policy, practice, statute or ordinance, which results in the arbitrary exclusion of the medical procedure of abortion from the general field of medical services provided, is patently and constitutionally defective. In addition to *Nyberg* and other cases cited *supra*, the identical question has been similarly and unanimously answered in *Doe*, et al. v. *Hale Hospital*, et al., 500 F.2d 144 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975); *Doe* v. *Mundy*, et al., 514 F.2d 1179 (7th Cir. 1975); *Santiago* v. *Colon*, et al., (Unreported, D.P.R. No. 74-362, Aug. 6, 1974); *Orr*, et al. v. *Koefoot*, et al., 377 F.Supp. 673 (D.Neb. 1974); and *Roe* v. *Arizona Board of Regents*, et al., 534 P.2d 285 (Ariz.Ct.App. 1975).

Respondents did not contend that the staffing of the obstetrical and gynecological department of City Hospital by St. Louis University medical school faculty and students was originally designed to foreclose abortions to patients. Nevertheless, abortions without exception have been excluded partially by reason of physicians' personally held moral or religious beliefs and by reason of requiring a degree of medical justification for abortion, inconsistent with the degree permitted by the United States Supreme Court in *Roe*, *supra*, and *Doe*, *supra*. The pre-January, 1973 effect of such staffing as to an unusually low rate of sterilizations performed can also be statistically demonstrated. It is obvious that since January 22, 1973, petitioners had continued to deal and to play their hand on this issue with a "stacked deck", by perpetuating the staffing policies.

To have permitted this situation to continue would not only have foreclosed the public hospital facilities and barred indigent women from their constitutional rights; but would have served to encourage other public hospital facilities to accomplish similarly through this mode of indirection what they had failed, when attempted, to achieve directly.

One salient fact belies all of petitioners' arguments. Not a single abortion had "been performed at the St. Louis public hospitals since January 1 of 1973 to date". (R. 31). Judicial notice and common knowledge as to the prevalence of abortion dramatically illustrated the scope of the problem.

Petitioner Poelker, Mayor of the City of St. Louis, testified that petitioner Wochner served as his appointee. (R. 3). Prior to and since April 5, 1973, petitioner Poelker, through petitioner Wochner, had enforced the policy that no abortions be performed within the city public hospitals unless "the life of the mother is in danger". (R. 6). One such reason for adoption of the policy by petitioner Poelker was "my own personal conviction that abortion is murder". (R. 10). Both petitioners

Poelker and Wochner testified that the policy was enforced despite the fact that no investigations, studies or surveys were ever made in regard to: the possibility of providing abortions and the cost factors involved (R. 11, 28); the availability of appropriate facilities (R. 12, 28); the availability of trained, experienced or willing personnel (R. 12, 28, 29); the availability of arranging with a private medical facility to handle City Hospital patients (R. 13); or the effect of providing abortions on existing services presently offered (R. 39, 40). But for the directions of petitioner Poelker, petitioner Wochner, Director of Health and Hospitals for the City of St. Louis and Acting Hospital Commissioner for the City of St. Louis (R. 19, 22-23) would have provided abortions within the public hospital facilities. (R. 31).

The public hospital facilities did and do provide prenatal care, postnatal care, childbirth and delivery services, miscarriage treatment, dilitations and curettages (D's and C's), hysterectomies and hysterotomies. (R. 29). Petitioner Wochner further stated that the cost of providing early abortions was less than the cost of providing childbirth services (R. 30, 31).

Respondents contended that the burden in this cause has been misplaced by the District Court. Petitioners had admitted throughout this cause the existence of the policy, the staffing of the obstetrical and gynecological service and the results, as evidenced in the very number of abortions performed. At the very least, the existence of the policies dissuaded significant numbers of indigent women from even seeking or requesting abortions at the public hospital facilities.

This Honorable Court in *Roe, supra,* placed upon petitioners the burden of justifying the arbitrary and capricious infringement, which had been in blanket effect for over two years.

> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." 410 U.S. at p. 155.

Petitioners never sought to justify their position and, in fact, their testimony set out, *infra,* negates any rational justification. Rather, petitioners sought to avoid any direct confrontation with the merits or with the validity of their actions.

C. **The fashioning of appropriate relief.**

The fashioning by the Appellate Court of appropriate relief, to include a positive duty upon petitioners to make every and all reasonable efforts to obtain willing physicians and, in each and every other manner, to offer the medical, abortion services to women who desire them, consistent with the manner that other similar or corresponding medical services are provided, was not unique. Medical treatment has been mandated under related circumstances to effect compliance with constitutional guarantees. See: *e.g., Wyatt,* et al. v. *Stickney,* etc., et al., 344 F.Supp. 373 (M.D.Ala. 1972); *Newman,* et al. v. *State of Alabama,* et al., 349 F.Supp. 278 (M.D. Ala. 1972); *Welsh,* et al. v. *Likins,* et al., 373 F.Supp. 487 (D.Minn. 1974); *Nelson,* et al. v. *Heyne,* et al., 491 F.2d 352 (7th Cir. 1974), *cert. denied,* 417 U.S. 976 (1974); and *O'Connor* v. *Donaldson,* 95 S.Ct. 2486, 45 L.Ed. 2d 396 (1975).

The fact that the arrangement of staffing the obstetrical-gynecological department by St. Louis University personnel was instituted prior to January 22, 1973 did not excuse its continuation; when the patent and obvious effect was to deny to respondents' class the right to constitutionally, protected medical services. The pre-existing nature of such circumstances has never justified its continuance, after the effective date of laws defining newly created, legal rights or status.

In a school desegregation case, *Cisneros*, et al. v. *Corpus Christi Independent School District*, et al., 467 F.2d 142 (5th Cir. 1972), *cert. denied*, 413 U.S. 920 (1973), the Fifth Circuit Court of Appeals held that the previously accepted concept of neighborhood schools would not justify the continued segregation of Mexican-American students, although they lived in a self-imposed neighborhood, known as the Mexican "corridor", and although the pattern of segregation was not statutorily mandated.

> "(W)e think it clear today beyond peradventure that the contour of unlawful segregation extends beyond statutorily mandated segregation to include the actions and policies of school authorities which deny to students equal protection of the laws . . ." 467 F.2d at p. 147.

Similarly, the contour of the invasion of respondents' rights extends beyond the mere facially void edict of petitioner Poelker; and includes the actions and policies of both petitioners, which have accomplished the total exclusion of all abortion procedures from within the confines of the city's public hospitals. Although *Cisneros, supra*, dealt with racial segregation, its principles are equally applicable to the segregational exclusion imposed in this cause upon the class of respondents desiring to terminate their pregnancies and to receive constitutionally permitted and guaranteed medical services within the public hospitals.

> "We therefore hold that the . . . segregation that exists . . . is unconstitutional—not de facto, not de jure, but unconstitutional." 467 F.2d at p. 149.

The school district in *Cisneros, supra*, had argued that, "in the absence of a malevolent motive, de facto and not de jure segregation exists" but the Appellate Court disposed of this contention by stating, " 'the factor of malevolent motivation is farther from the core of invidiousness that condemns explicit . . . discrimination than are the odious effects produced.' " 467 F.2d at p. 150.

Respondents suggest that the standard by which all of petitioners' "express and implied policies, rules, regulations, procedures and practices barring, thwarting, limiting and infringing upon the utilization of the personnel, facilities and services" ("Complaint", para. 3) of the public hospitals for the performance of abortions should be measured, is no less than that employed to gauge employment discrimination. The form of discrimination exercised herein by petitioners was total, irreparable and arbitrary.

As this Honorable Court stated in the oft-cited *Griggs*, et al. v. *Duke Power Co.*, 401 U.S. 424 (1971), regarding employment policies neutral on their face but discriminatory in practice,

> "(G)ood intent or absence of discriminatory intent does not redeem . . . procedures . . . that operate as 'built-in headwinds' for minority groups . . ." 401 U.S. at p. 432.

The staffing procedures of the city public hospitals may be viewed as analogous to the "disparate effect" cases, premised upon *Griggs, supra*, and which have been widely accepted by various Circuit Courts of Appeals. See *e.g.*: *Wallace* v. *Debron Corporation*, 494 F.2d 674 (8th Cir. 1974); *Gregory* v. *Litton Systems, Inc.*, 472 F.2d 631 (9th Cir. 1972); *Castro*, et al. v. *Beecher*, et al., 459 F.2d 725 (1st Cir. 1972) and *Chance*, et al. v. *The Board of Examiners*, et al., 458 F.2d 1167 (2d Cir. 1972).

In light of the total absence of justification offered by petitioners for the staffing procedures, the validity of the same could not be sustained. The rationale of the then existing situation, as amply demonstrated by both the testimony of petitioner Poelker and of petitioner Wochner, set forth *supra*, not only was less than "compelling", but bordered on the non-existent.

The District Court in its "Memorandum and Order" cited *Roe, supra, Doe, supra,* and the opinion of the Appellate Court in *Nyberg, supra,* to reach its conclusion that,

> "In effect, plaintiff is asking this Court to hold that the City of St. Louis must provide someone to take care of any woman who requests an abortion at one of its hospitals. Such a holding would be clearly contrary to established constitutional principles and this Court will issue no order designed to have such an effect." (A. 25).

With due respect, respondents suggest that the District Court misinterpreted the true meanings of *Roe, Doe* and *Nyberg, supra,* and chose to apply an interpretation far stricter than that intended by this Honorable Court or by the Eighth Circuit, respectively. Respondents suggest that the passages cited by the District Court were mere reaffirmations of this Honorable Court's principle in *Roe, supra,* that,

> "This means, on the other hand, that, for the period of pregnancy prior to this, 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." 410 U.S. at p. 163.

The right of a hospital not to admit or to treat a patient or any specific patient is only again a reaffirmation of the same principle, more explicitly stated in *Doe, supra,* that,

> "*Roe* v. *Wade, supra,* sets forth our conclusion that a pregnant woman does not have an absolute constitutional right to an abortion on her demand." 410 U.S. at p. 189.

It is one matter to acknowledge the right of medical institutions and medical personnel to make independent, concurring opinions as to the advisability of performing any specific and individual request for an abortion; and, on the other hand, to exaggerate out of proportion that right into the principle that

all abortion requests can be denied in arbitrary fashion by a policy with the inevitable effect of excluding any physician willing to perform a non-therapeutic abortion.

The issue of Missouri Revised Statute, Section 197.032, raised by the District Court in its "Memorandum and Opinion" (A-22) and by petitioners (Pet. 7) was adequately dealt with in *Doe* v. *Mundy,* etc., et al., 514 F.2d 1179, 1182 (7th Cir. 1975), where the Appellate Court stated,

> "First, defendants argue that since the hospital's policy was promulgated under an enabling state statute, the plaintiffs are attempting to enjoin operation of the statute itself without convening of the three-judge court required by 28 U.S.C. § 2281. The statute, Wis. Stat. § 140.42, reads in its relevant part:
>
> > '(1) No hospital shall be required to admit any patient or to allow the use of the hospital facilities for the purpose of performing a sterilization procedure or removing a human embryo or fetus.'
>
> Defendants' argument must fail because plaintiffs do not seek state-wide injunctive relief against the operation of a statute; they seek only to enjoin the enforcement of one hospital's rule. Although the conclusion that the statute is unconstitutional may logically follow from the ruling of the District Court, this result does not mean a three-judge court is required. Our conclusion is supported by McCrimmon v. Daley, 418 F.2d 366, 368-369 (7th Cir. 1969), which held that the granting of injunctive relief against the operation of a city ordinance promulgated under a state enabling statute did not require the convening of a three-judge court.."

Similarly is *Roe* v. *Arizona Board of Regents,* et al., 534 P.2d 285, 288 (Ariz.Ct.App. 1975), and the Appellate Court's discussion of the same issue below at 515 F.2d at pp. 545-546 at fn. 7.

II

The Appellate Court Correctly and Properly Awarded Attorneys' Fees on the Basis of "Bad Faith" to Respondents' Counsel.

Petitioners erroneously claim that the Appellate "Court specifically rejected respondent's suggestion of the alternative ground of bad faith" (Pet. 34). This is simply untrue. The Appellate Court on April 14, 1975, stated,

> "However, in light of our determination that attorneys' fees are to be awarded under the 'private attorney general' theory, we need not and do not decide whether or not the actions of the city underlying this litigation and during the course of it call for application of this second exception." (A-37 at fn. 9).

The question of "bad faith" was reserved and not rejected by the Appellate Court. The Appellate Court had more than ample and uncontroverted evidence on which to base its determination of bad faith, only a minor portion of which it set forth in the record. Manifestly, there is no clear abuse of discretion to justify in any manner the setting aside of such award. The Appellate Court refused to reconsider said award *en banc* on June 14, 1975. The Appellate Court in its assessment of attorneys' fees and costs against only petitioner Poelker, deliberately excluded petitioner Wochner from liability for the same; having determined that "bad faith" had not been displayed by the latter. 515 F.2d at p. 548 at fn. 9.

This Honorable Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, et al., 421 U.S. 240 (1975), recognized the clear and specific exception to the general principle therein set forth,

> "Also, a court may assess attorneys' fees for the 'willful disobedience of a court order . . . as part of the fine to

> be levied on the defendant, *Toledo Scale Co.* v. *Computing Sale Co.*, 261 U.S. 399, 426-428 (1923),' *Fleischmann Distilling Corp.* v. *Maier Brewing Co., supra,* at 718; or when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . . .' *F. D. Rich Co.*, 417 U.S. at 129 (citing *Vaughan* v. *Atkinson*, 369 U.S. 527 (1962)); cf. *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575, 580 (1946). These exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress, . . ." 421 U.S. at pp. 258-259.

Petitioner Poelker was found to have "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." The actions of petitioner Poelker were directly contrary to a host of unanimous and identical, federal court decisions, in two of which this Honorable Court had denied certiorari and one of which arose within the Eighth Circuit. See, *e.g.*: *Doe*, et al. v. *General Hospital of the District of Columbia*, et al., 313 F.Supp. 1170 (D.D.C. 1970), *affirmed*, 434 F.2d 423 (D.C.C. 1970), and *affirmed*, 434 F.2d 427 (D.C.C. 1970); *Nyberg*, et al. v. *The City of Virginia*, et al., 495 F.2d 1342 (8th Cir. 1974), *cert. denied*, 419 U.S. 891 (1974); *Doe*, et al. v. *Hale Hospital*, et al., 500 F.2d 144 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975); *Doe* v. *Mundy*, et al., 514 F.2d 1179 (7th Cir. 1975); *Santiago* v. *Colon*, et al. (Unreported, D.P.R., No. 74-362, Aug. 6, 1974); *Orr*, et al. v. *Koefoot*, et al., 377 F.Supp. 673 (D. Neb. 1974); and *Roe* v. *Arizona Board of Regents*, et al., 534 P.2d 285 (Ariz.Ct.App. 1975).

Petitioner Poelker unequivocally testified at trial that the reason for adoption of his policy was "my own personal conviction that abortion is murder." (R. 10). Petitioner Poelker further testified the policy was enforced despite the fact that no investigations, studies or surveys were ever made as to: the possi-

bility of providing abortions and the cost factors involved (R. 11, 28); the availability of appropriate facilities (R. 12, 28); the availability of trained, experienced or willing personnel (R. 12, 28, 29); the availability of arranging with a private medical facility to handle city hospital patients (R. 13); or the effect of providing abortions on existing services presently offered (R. 39, 40). To restate, but for the directions of petitioner Poelker, petitioner Wochner would have provided abortions within the public hospital facilities. (R. 31).

The Appellate Court aptly noted in its opinion,

> "Nonetheless, we are convinced that an award of attorneys' fees to Doe is proper here under another exception to the rule which was specifically recognized and reiterated in *Alyeska Pipeline*—when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.' Id. — U.S. —, 95 S.Ct. at 1622 (*quoting* F. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129, 94 S.Ct. 2157, 40 L.Ed. 2d 703 1974)) *See, e.g.*, Fowler v. Schwarzwalder, *supra*, 498 F.2d at 144 (dictum); Bell v. School Board, 321 F.2d 494, 500 (4th Cir. 1963)." 515 F.2d at p. 547.

Respondents suggest that to deny the previously awarded attorneys' fees would critically emasculate the recent judgment of the Appellate Court. The rightful and warranted award of attorneys' fees in this cause has produced an effect upon the officials of St. Louis more sobering than the accompanying judgment or any previous judgment in related abortion actions.

For this Honorable Court to vacate said attorneys' fees at this stage of the proceedings would serve as a green light for petitioner Poelker to continue thwarting in dilatory fashion the judgments of this Honorable Court and the Appellate Court. The utter and total impunity with which petitioner Poelker had operated in the past could only have been checked and effectively

challenged through the proper allowance of attorneys' fees, upon the permitted and warranted basis of "bad faith". Petitioner's conduct, as manifested by the evidence, the record, his statements directly and through his counsel and his actions were amply sufficient for the finding by the Appellate Court.

Petitioners blithely choose to ignore the actual bases for the Appellate Court's said determination of "bad faith" on the part of petitioner Poelker and instead attempt to build arguments based on false premises. Petitioners contend that *Wulff*, et al. v. *Singleton*, etc., 508 F.2d 1211 (8th Cir. 1974) "involved construction of Title XIX of the Social Security Act" and "(n)ot the question of *whether* the Federal or State government were constitutionally required to provide such funds for 'indigent women' ". (Pet. 36). In fact, the *only* question raised by plaintiffs in *Wulff, supra*, was the constitutional issue and the statutory issue of conflict with Title XIX was never raised nor briefed. Petitioners have distorted the holding in *Wulff, supra*, a full one hundred eighty degrees; after which they proceed to cite additionally *Roe*, et al. v. *Ferguson*, et al., 515 F.2d 279 (6th Cir. 1975), which was specifically remanded so that the constitutional issue could be determined, and *Roe*, et al. v. *Norton*, et al., — F.2d — (2nd Cir. 1975), reversing on other grounds, 380 F.Supp. 726 (D. Conn. 1974), which never dealt with the constitutional issue raised in *Wulff, supra*. (Pet. 36-37).

After a thorough analysis of the record and petitioner Poelker's words and actions, the Appellate Court properly concluded that said petitioner had acted in a manner properly characterized as "arbitrary", "obstinately", "intransigent", "wanton", "callous", "oppressive", and "obdurate". 515 F.2d at pp. 546-548.

III

The Appellate Court Correctly and Properly Ruled That Respondent Doe Had Standing and the Issue of Standing Is Herein Untimely Raised.

The issue of respondent Doe's standing in the instant cause was squarely decided in respondents' favor in the opinion of the first appeal of this cause reported at 497 F.2d 1063 (8th Cir. 1974), rehearing denied *en banc* June 27, 1974 and stay denied by this Honorable Court on July 18, 1974 (Cause No. A-1320). Petitioners failed to appeal or to seek a writ of certiorari in timely fashion and the matter is thereby foreclosed at this stage of the proceedings. Supreme Court Rules 11 and 22.

Even assuming the matter may be raised herein more than one year after the appellate decision of the issue, the law as to such standing clearly forecloses petitioners' arguments on the merits.

Respondent Doe was pregnant on August 17, 1973, as alleged in her "Complaint for Declaratory Judgment and Injunctive Relief," para. 7, filed on August 17, 1973 and as verified in her "Affidavit of Plaintiff, Jane Doe," paragraph 4, filed on October 5, 1973. In fact, Respondent Doe on August 17, 1973 was in the last few days of the first trimester of pregnancy. The inability of respondent Doe to obtain an immediate abortion would have foreclosed the possibility of obtaining an out-patient clinical procedure and would have necessitated an in-patient surgical method involving substantially, increased, risk to her.

Respondent Doe readily admitted that she obtained an abortion on August 22, 1973. The mortality and morbidity of abortion increases with every passing day of gestation. The natural reticence of potential plaintiffs in actions of this type, to brave the risk of public disclosure, harassment and censure could not be ignored; particularly since many of those who utilize the public hospital facilities are those least able to afford the financial, energy and time expenses of litigation.

Respondents would direct the attention of his Honorable Court to the recent language in *Roe, supra*, wherein the specific issue as to the effect of a pregnancy's termination on mootness was answered.

> "A. *Jane Roe.* Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and as late as May 21 of that year when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas."
>
> . . .
>
> "The appellee notes, however, that the record does not disclose that Roe was pregnant at the time of the District Court hearing on May 22, 1970, or on the following June 17 when the court's opinion and judgment were filed. And he suggests that Roe's case must now be moot because she and all other members of her class are no longer subject to any 1970 pregnancy."
>
> "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. . . ."
>
> "But when, as here, pregnancy is a significant fact in the litigation, the normal 166-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be

'capable of repetition, yet evading review.' Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). . . ."

"We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot." 410 U.S. at pp. 124-125.

Similarly, is *Doe, supra*, decided the same day in which it was noted that the action was filed on April 16, 1970 (410 U.S. at p. 184) and held pregnancy on day of filing to be sufficient, without evidence or notation of pregnancy beyond that date.

"Our decision in *Roe* v. *Wade, ante*, p. 113, establishes (1) that, despite her pseudoym, we may accept as true, for this case, Mary Doe's existence and her pregnant state on April 16, 1970; (2) that the constitutonal issue is substantial; (3) that the interim termination of Doe's and all other Georgia pregnancies in existence in 1970 has not rendered the case moot; and (4) that Doe presents a justiciable controversy and has standing to maintain the action."

". . . Doe and her class are recognized . . ." 410 U.S. at pp. 187-188.

In the District Court's "Memorandum and Order", it specifically noted that,

"This Court recognizes that the pregnancy which gave rise to the present controversy herein has been resolved by the plaintiff's termination of her pregnancy, but that the underlying problem of the blanket policy against abortions in the public hospitals of the City of St. Louis still remains." (A-3)

Cases cited by petitioners simply are not applicable nor analogous. In *Crossen*, et al. v. *Breckenridge*, etc., et al., 446 F.2d

833 (6th Cir. 1971), *vacated and remanded on other grounds*, 410 U.S. 950 (1973), is cited by the petitioners as authority for their position. (Pet. 50). In fact, a close reading of the related *Crossen* case demonstrates the absolute correctness of respondents' position.

"The case was filed by the plaintiffs on May 13, 1970. . . . The plaintiffs, an obstetrician, a minister, a pregnant woman, a woman having the capacity to become pregnant and a women's liberation group, each claimed standing to attack the statute." *Crossen*, et al. v. *Attorney General of the Commonwealth of Kentucky*, 344 F.Supp. 587, 588-589 (E.D. Ky. 1972).

Crossen, supra, had originally been dismissed for lack of standing on October 7, 1970 (see 344 F.Supp. at p. 589), some 147 days after its filing. On June 23, 1971, some 406 days after filing, the Sixth Circuit Court of Appeals reversed and held,

"At the commencement of the action appellant Craddock was pregnant and had allegedly been denied an abortion . . . On these facts we find that appellant Craddock has standing . . ."

. . .

"Appellant Pozzuto, on behalf of herself and all other similarly situated married women, alleges that she is not pregnant but may desire to terminate future pregnancies and would be unable to obtain a medical abortion . . . we hold that appellant Pozzuto does not have standing . . ." *Crossen*, et al. v. *Breckenridge*, etc., et al., 446 F.2d 833, 839 (6th Cir. 1971), *vacated and remanded on other grounds*, 410 U.S. 950 (1973).

On May 19, 1972, some two years and six days after filing of suit, the District Court ruled on the merits of the plaintiffs' claims, including plaintiff Craddock who had been pregnant at

the initial filing of said cause. *Crossen*, et al. v. *Attorney General of the Commonwealth of Kentucky*, 344 F.Supp. 587 (E.D.Ky. 1972).

The First Circuit Court of Appeals has also held that termination of pregnancy during pendency of District Court proceedings does not render the cause moot, even though plaintiffs similarly aborted immediately after filing suit and before trial.

> "First, defendant says that he has a probability of succeeding on the merits because plaintiffs' case is moot due to the fact that after its commencement plaintiffs voluntarily obtained abortions in New York. The fact that a plaintiff had other available relief does not moot the case, Hathaway v. Worcester City Hospital, 1 Cir., 1973, 475 F.2d 701, and defendant does not so claim. Nor, of course, does defendant dispute the basic *Roe* rule that the necessarily short duration of a pregnancy does not, in normal circumstances, create mootness when pregnancy ceases."
>
> . . .
>
> "We consider that defendant's claim of mootness is a will-o'-the-wisp and assumes the very question at issue. If a plaintiff has a right to terminate her pregnancy—which is the legal question before us—the sooner she succeeds in doing so, the better. We have in mind the trimester trilogy, on which defendant relies in another connection, and its effect on viability and the pregnant plaintiff's health. *See* Roe v. Wade, 410 U.S. at 149-150, 93 S.Ct. at 725. It seems not only illogical but, to use a polite word, harsh, to argue that in order to establish her right to an abortion a woman must decline to have it." *Doe*, et al. v. *Israel*, etc., 482 F.2d 157, 158 (1st Cir. 1973).

Petitioners' suggestion that respondent Doe should have borne a child in order to maintain her standing, recalls shades of our

history when innocence of witchcraft was proven by the drowning of the accused.

In this cause the District Court noted that respondent Doe had terminated her pregnancy prior to service on petitioner Wochner. (Pet. 40). The date of service, if diligent, has never been held a critical time reference. Instead, the filing of the action is the relevant consideration of timeliness. See, *The Moore Company of Sikeston, Missouri*, et al. v. *Sid Richardson Carbon & Gasoline Company*, 347 F.2d 921, 922-923 (8th Cir. 1965), *cert. denied*, 383 U.S. 925 (1966). Federal Rule of Civil Procedure No. 3 specifically provides, "A civil action is commenced by filing a complaint with the court".

The language of *Roe, supra*, and *Doe, supra*, as to standing in pregnancy cases is not strictly applicable to only the appellate process. No logical reason exists to so narrowly interpret it nor does reason support such an interpretation. A close reading belies such a meaning or intent. The language is equally applicable to all stages of litigation. To hold otherwise would institute an arbitrary distinction and subject pregnant plaintiffs to the capricious whims, delays and dilatoriness of courts and opposing counsel. It should be noted that respondent Doe was 12 weeks pregnant at time of filing, would have been 19 weeks pregnant at time of filing for summary judgment on October 5, 1973 and would have been 39 weeks pregnant and past her expected date of delivery when the District Court below first learned of her non-pregnant status; having failed in the interim to decide or rule on her motion for summary judgment. (A-3).

As so aptly noted in *Roe, supra*, a normal pregnancy is 38 weeks (410 U.S. at p. 125) and "(m)oreover, the risk to the woman increases as her pregnancy continues". 410 U.S. at p. 150.

How much risk should pregnant plaintiffs be judicially required to endure? How much risk is too much risk? Should

pregnant plaintiffs be required, in order to assure their standing, to assume the ever increasing rates of morbidity and mortality until the date of service on defendants, until defendants file motions, until defendants file an answer, until date of trial, until date of court judgment or until some other as equally arbitrary, indefinite and undeterminable period of time? This Honorable Court noted, it is only during the first trimester that "(m)ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth." *Roe, supra,* 410 U.S. at p. 149. Petitioners would place respondent Doe and all potential similar plaintiffs between the Scylla of being foreclosed an abortion through the dismissal of her suit and the Charybdis of retaining her standing while increasing the risk to her life.

Petitioners have not cited a single case in which plaintiffs were held not to have standing when pregnant at time of filing. Cases denying standing to women on the basis of only a possible future pregnancy are not analogous nor of the slightest precedential value.

CONCLUSION

The number of pregnant, indigent women in the City of St. Louis, Missouri, who have been irreparably damaged through the denial to them of their fundamental constitutional rights by the actions of petitioners, is staggering. The principles upheld by the Appellate Court in its two prior decisions of this cause have been firmly and unanimously established by all federal courts ruling upon the identical issues. Petitioners have cited not a single case to the contrary.

Petitioners should not be allowed through emotionally laden hysterics nor ill-founded and unmeritorious legal claims to escape the full and fair impact of the Appellate Court's judgments.

At a press conference on October 10, 1975, petitioner Wochner admitted that to date not a single abortion has yet been performed, despite the fact that the number of patient inquiries has been 450% of his recent estimate as to the expected demand. It has been reliably estimated that only 11% of the need for abortion services is presently being met in Missouri and that 53% of the need is among low and marginal income women. THE ALAN GUTTMACHER INSTITUTE, *Provisional Estimates of Abortion Need and Services in the Year Following the 1973 Supreme Court Decisions: United States, Each State and Metropolitan Area,* New York, 1975.

Accordingly, respondents respectfully pray that petitioners' "Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit" be denied forthwith.

Respectfully submitted

FRANK SUSMAN
SUSMAN, SCHERMER, WILLER
& RIMMEL
7733 Forsyth Boulevard—Suite 1100
St. Louis, Missouri 63105
(314) 725-7300
Attorneys for Respondents

Certificate of Service

I, the undersigned attorney for respondents and a member of the bar of the United States Supreme Court, do hereby certify that pursuant to Supreme Court Rule No. 33, I have caused to be served a true and correct copy of the foregoing "Respondents' Brief in Opposition to 'Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit'," upon

each party required to be so served, by depositing said copy in a United States Postal Service mail box, with first class postage prepaid and affixed, addressed to Mr. Jack L. Koehr and to Mr. Eugene P. Freeman, Office of the City Counselor, attorney for petitioners, St. Louis City Hall, Room 314, 1200 Market Street, St. Louis, Missouri 63103.

FRANK SUSMAN
SUSMAN, SCHERMER, WILLER
& RIMMEL
7733 Forsyth Boulevard—Suite 1100
St. Louis, Missouri 63105
(314) 725-7300